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CASES CITED:

# SUPREME COURT OF THE UNITED STATES

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CORT A. ROSENHAN, PETITIONER

vs.

UNITED STATES OF AMERICA

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# Petition for Writ of Certiorari

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of Cort A. Rosenhan, a citizen of the State of Utah, respectfully shows to this Honorable Court:

## I.

## SUMMARY STATEMENT OF MATTER INVOLVED

The Petitioner, Cort A. Rosenhan, who is an amateur airplane builder, constructed a plane of his own, upon which a certificate of airworthiness was granted by the Aeronautics Commission of the State of Utah under authority of Section 7, Chapter 12, Laws of Utah, 1939. Rosenhan

applied for a certificate of airworthiness to the Civil Aeronautics Commission of the United States Government but the Commission refused even to examine his craft to determine whether or not it was eligible for a certificate. Rosenhan, nevertheless, flew his craft within a civil airway designated by the Civil Aeronautics Authority in Section 60.2001 of the Air Traffic Rules as amended to May 31, 1938, which air lane extends ten miles on each side of a center line running generally east and west through the State of Utah and passing through Salt Lake City. At no time did Rosenhan cross the borders of the State of Utah, nor did he at any time, so far as the pleadings indicate, come in contact with or in any way affect any craft operting in interstate commerce.

Rosenhan was then charged by complaint of the United States of America, filed in the United States District Court for the District of Utah, Central Division, with violation of Title VI of the Civil Aeronautics Act of 1938 and paragraph 60.31 (a) of the Civil Air Regulations and Air Traffic Rules as amended to May 31, 1938.

Rosenhan filed an answer and an amended answer in which he admitted flying the plane within the civil airway as alleged by the Government, but alleging that he had operated entirely within the borders of the State of Utah, and also setting up the fact that his craft had been granted an airworthiness certificate by the Utah State Aeronautics Commission. In addition he alleged that the Act and regulations under which he was charged were unconstitutional in that they were in violation of the Tenth Amendment to the Constitution of the United States for certain reasons set out in the Answer. The Government made a motion for judgment on the pleadings which was granted,

thus giving the Defendant Rosenhan no opportunity to sustain his allegations by the introduction of evidence.

An appeal from the judgment of the District Court was taken by Rosenhan to the United States Circuit Court of Appeals for the Tenth Circuit, in which appeal your Petitioner, the Defendant therein, sought to reverse the judgment of the District Court for the reasons that:

(a) The motion for judgment on the pleadings admitted for the purpose of such motion the truth of all allegations in the Defendant's Answer.

(b) Under such allegations the certificate of airworthiness issued upon the Defendant's plane by the Utah State Aeronautics Commission meets the requirements of Title VI of the Civil Aeronautics Act of 1938 and paragraph 60.31 (a) of the Civil Air Regulations and Traffic Rules as amended to May 31, 1938.

(c) Under such allegations the act under which the Defendant was convicted is in violation of the Tenth Amendment to the Constitution of the United States of America.

The United States Circuit Court of Appeals for the Tenth Circuit rendered an opinion affirming the judgment of the United States District Court.

## II.

## JURISDICTION

1. The opinion of the Circuit Court of Appeals affirming the judgment of the District Court was filed on the 16th day of November, 1942. (Record, 19-22.)

2. The Petition is for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Tenth Circuit. (Judicial Code, Section 240, Amended: 28 U.S.C.A. 347.)

3. The entire record is before this Honorable Court on this Petition for Writ of Certiorari which is made within the time limit prescribed by statute and the rules of this Court.

## III.

## QUESTIONS PRESENTED

The questions presented in the action sought to be reviewed are:

(a) Whether or not under the pleadings in the case the Defendant in the Court below violated the requirements of Title VI, of the Civil Aeronautics Act of 1938 and paragraph 60.31 (a) of the Civil Air Regulations and Traffic Rules, as amended to May 31, 1938.

(b) Whether, under the allegations of the pleadings, the Act under which judgment was rendered against the Defendant and the rules promulgated thereunder, are in violation of the Tenth Amendment to the Constitution of the United States.

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioner respectfully urges that this Court should grant the Writ of Certiorari to review the decision of the Circuit Court for the reason that (a) such Court has

decided an important question of federal law which has not been, but should be, settled by this Court, namely, the question as to the extent of the powers of the federal government to regulate intra-state air commerce; and (b) that the decision of the Circuit Court goes far beyond, and is in conflict with, applicable decisions of this Court relating to the powers of the federal government to regulate commerce.

CORT A. ROSENHAN,
*Petitioner.*

GROVER A. GILES,

ZAR E. HAYES,
*Attorneys for Petitioner*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### OPINION OF CIRCUIT COURT

The decision of the Circuit Court of Appeals for the Tenth Circuit, from which this appeal is taken, was filed on November 16, 1942 and is printed on pages 17 to 22 of the Record, and is reported in 131 Fed. (2) 932.

### STATEMENT OF THE CASE

The facts of the case are set forth in the Petition herein. (See pages 1 to 5.)

### JURISDICTION

The jurisdiction of this Court is invoked under Section 240, Judicial Code, as amended; 28 U.S.C.A. 347.

### STATEMENT OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Defendant below, Cort A. Rosenhan, violated the requirements of Title VI of the Civil Aeronautics Act of 1938 and paragraph 60.31 (a) of the Civil Air Regulations and Traffic Rules as amended to May 31, 1938.

2. The Circuit Court of Appeals of the Tenth Circuit erred in holding that, under the allegations of the pleadings in the Court below, the Act under which judgment was rendered against the Defendant and the rules promulgated thereunder, are not in violation of the Tenth Amendment to the Constitution of the United States.

## ARGUMENT

The issues to be determined arise upon the Complaint, the Answer, and a Motion for Judgment upon the pleadings. We are inclined to agree with the statement contained in the opinion of the United States Circuit Court of Appeals for the Tenth Circuit that the pleadings as cast, present the bare legal questions as to whether the Congress of the United States may in the exercise of its commerce powers, by its definition of interstate air commerce, include within its scope "any operation or navigation of air craft within the limits of any civil air way" (52 Stat. 977; 499 U.S.C.A. 403 [3]), and thereby forbid the intrastate operation of a civil aircraft within any area which may be designated by a federal agency as a "civil air way," unless there is currently in effect an airworthiness certificate issued by the duly constituted federal authority, and whether the state certificate of airworthiness meets the requirements of the federal Act.

## ARGUMENT I

UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER AND AMENDED ANSWER THE CERTIFICATE OF AIRWORTHINESS ISSUED UPON THE DEFENDANT'S PLANE BY THE UTAH STATE AERONAUTICS COMMISSION MEETS THE REQUIREMENTS OF THE FEDERAL CIVIL AERONAUTICS ACT OF 1938 AND THE RULES PROMULGATED THEREUNDER.

Section 610 (a) of the Civil Aeronautics Act of 1938 (Public No. 706), which the Defendant is accused of violating, provides in part:

"It shall be unlawful—

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an air worthiness certificate, or in violation of the terms of any such certificate; * * *."

Paragraph 60.31 (a), of the Civil Air Regulations, is practically the same as the statutory section quoted above. It will be observed that neither of these sections make any requirement regarding who shall issue the airworthiness certificate. So far as these sections are concerned it, therefore, appears that an airworthiness certificate issued by any competent authority should be sufficient to meet the requirements of the statute.

Section 603 (c) of the Civil Aeronautics Act of 1938, provides as follows:

"The registered owner of any aircraft may file with the Authority an application for an airworthiness certificate for such aircraft. If the Authority finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, it shall issue an airworthiness certificate. The Authority may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Authority and shall set forth such information as the Authority may deem advisable. The certificate number, or such other individual designation as may be required by the Authority, shall be displayed upon each aircraft in accordance with regulations prescribed by the Authority."

It will be observed from an examination of the foregoing section that the language is permissive and not mandatory in nature. It provides that an owner of an aircraft *may*, not that he *must*, file with the Authority an application for an airworthiness certificate. Clearly, therefore, this section is not mandatory and exclusive, but rather is merely directory and permissive.

The following language in this regard is found in paragraph 262 of Crawford, on Statutory Construction:

> "Ordinarily the words 'shall' and 'must' are mandatory, and the word 'may' is directory, although they are often used interchangeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. . In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words 'shall' and 'must' to be directory, they should be given that meaning. Similarly, under the same circumstances, the word 'may' should be given a mandatory meaning, and especially where the statute concerns the rights and interests of the public, or where third persons have a claim de jure that a power shall be exercised, or whenever something is directed to be done for the sake of justice or the public good, or is necessary to sustain the statute's constitutionality.

> "Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted. The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning; otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated."

Section 7, Chapter 10, Laws of Utah, 1937, as amended by Chapter 12, Laws of Utah, 1939, provides as follows:

> "It shall be unlawful for any person to operate, pilot or navigate, or cause or authorize to be operated, piloted or navigated within this state any civil aircraft unless such aircraft has a currently effective certificate of registration issued either by the government of the United States, or the Utah State Aeronautics Commission, but this restriction shall not apply to aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operations of such registered aircraft or to a non-passenger-carrying flight solely for inspection or test purposes authorized by the commission to be made without such certificate of registration or to amateur built aircraft which have met the airworthiness requirements set forth in the rules and regulations promulgated by the commission, and which have been registered by the commission."

Under authority of the foregoing provision a license showing that the craft in question had met the airworthiness requirements of the Utah State Aeronautics Commission had been issued on the craft operated by your Petitioner. It is the position of Petitioner that this license met the requirements of the Civil Aeronautics Act and the Civil Air Regulations relative to certificates of airworthiness. Had it been the intent of the Congress to require that the airworthiness certificates be issued by the Civil Aero-

nautics Authority they would have so stated in the law. However, unless such provision be read into the law it appears that any certificate issued by competent legal authority meets the requirements of the statute and regulations issued pursuant thereto.

It should be remembered in this connection that the statute with which we are dealing is penal in nature and so should be strictly construed. In regard to the construction of penal statutes, the following language is found in paragraph 240 of Crawford, on Statutory Construction.

> "Criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted.
>
> "Only those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought. For example, the word 'carriage' cannot be construed to include automobiles, or 'self-propelled vehicle' to include aircraft. Nor can the court, as a general rule, supply or correct any omission of the legislature regardless of what may be its cause. And it matters not that the court believes that the statute should have been more comprehensive, or that a strict construction produces an undesirable result.

> "Since the power to inflict punishment is vested in the legislature rather than in the courts, there is considerable danger in subjecting criminal or penal statutes to a liberal construction, lest the court invade the province of the legislature. Moreover, the creation of an offense by interpretation may operate to entrap the unwary and ignorant and threaten the rights of the people generally. As is obvious the rule of strict construction largely and properly grows out of the tenderness of the law for the rights of the individual."

It is also a general principle in law that any doubt or ambiguity in a statute should be construed in favor of the Defendant and against the State or the Government. In support of this position, see *United States vs. Sheldon,* 2 Wheat 119; *Harrison vs. Vose,* 9 How. 372; *ex Parte Webb,* 225 United States 663; *Shipp vs. Miller,* 2 Wheat 316, and *Bolles vs. Outing Company,* 175 U. S. 262.

It is evident that if your Petitioner, the Defendant below, is to be held guilty of violating the statute in question, there must be read into the statute the provision that certificates of airworthiness must be issued by the Civil Aeronautics Authority of the United States Government. This requires not only the construction of an ambiguous statute against a Defendant but actually requires legislation by the judiciary, and, therefore, clearly should not be done.

It may be maintained by the Government that the intent of Congress was that such certificate should be issued by the Civil Aeronautics Authority for the reason that any other construction would result in different standards being imposed by different states. While the construction urged by Petitioner may undoubtedly result in differ-

ent standards for different states, there appears to be no good reason why regulations in this regard should be absolutely uniform.

In regard to Air Traffic Rules such as those regulating the lights on planes, the method of passing or the method of landing or taking off at air fields, it is obvious that strict uniformity is desirable wherever aircraft operating in intrastate flights may come in contact with aircraft operating in interstate flights. However, this same argument does not apply in regard to the standards of airworthiness of a craft. So long as a craft is pronounced airworthy by a competent aviation authority, minor variations in standards which naturally would exist even between the judgments of men of recognized authority in their fields should not conceivably affect to a material degree the effect which such craft operating in intrastate commerce could have on interstate commerce.

The task of examining and granting certificates of airworthiness to privately built aircraft is such a comprehensive and difficult job that the Civil Aeronautics Authority has refused even to undertake it and will grant certificates of airworthiness only to aircraft constructed by a commercial builder. On the other hand, the Aeronautics Commissions of the various states, including the State of Utah, make careful examinations of privately built craft to determine their airworthiness and, if it appears that they are airworthy crafts, will grant certificates to them. The Congress undoubtedly foresaw the extensive task it would be for the United States Civil Aeronautics Authority to examine each privately built craft and it may be that it was not intended that the Aeronautics Authority should be compelled to make such an examination, as in-

deed, they do not. But could it have been the intent of Congress to deny the builder of a private plane the right to fly that plane even though it may be a better plane than those turned out by commercial factories? It appears rather that it was the intent of Congress to permit these planes to fly, if in fact they were airworthy and had a certificate of airworthiness from a competent legal authority.

The Act, if given any other interpretation, when considered in connection with the attitude taken by the Civil Aeronautics Authority would, in fact, be class legislation of an arbitrary capricious and unduly discriminatory nature, without a reasonable ground of classification, for the reason that the Civil Aeronautics Authority will not grant certificates of airworthiness to privately built craft, regardless of their degree of excellence.

## ARGUMENT II

### THE ACT AND REGULATIONS UNDER WHICH JUDGMENT WAS RENDERED AGAINST THE DEFENDANT ARE IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It must be born in mind that this action arises out of alleged violation of peace-time legislation and regulations. It may be admitted for the purposes of this argument that strict and absolute regulation of all aircraft by the federal government during times of war might be necessary and that the Congress, under its war powers, might properly regulate all conditions and circumstances under which civilian planes might be operated. Our problem,

however, concerns only the extent of the federal government's power to regulate and control the movement in intrastate flights of civil aircraft in times of peace.

In the face of the allegations made by your Petitioner, the Defendant below, and admitted by the government for the purpose of its motion for judgment on the pleadings, such motion could have been granted only under the theory that the power of Congress to regulate air commerce, whether it be intrastate or interstate is plenary. Such is quite clearly not the law. The authority granted to Congress to regulate air commerce must be derived from the general grant of power in Section 8, Article 1, of the Constitution of the United States:

> "To regulate commerce with foreign nations among the several states and with the Indian tribes."

No other grant of such power is contained in the federal Constitution. Under the terms of the Tenth Amendment to the Constitution of the United States of America, which reads:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

only those powers which can be derived from the general commerce clause may be exercised by the Congress in regard to air commerce. Any other power is reserved to the states.

Probably no other section of the Constitution has been so often interpreted by the Supreme Court as has the commerce clause. However, so far as your Petitioner is aware this clause has never been considered by this Court in regard

to the regulation by Congress of intrastate flight of aircraft. The general rule, of course, is that Congress may regulate interstate commerce and also may regulate intrastate commerce where that commerce directly and proximately affects interstate commerce. However, as has been pointed out by this Court on many occasions, this power does not extend to the regulation of intrastate commerce which has only an indirect or remote effect upon interstate commerce. If such were allowed, it would entirely defeat the power of the states to regulate commerce within their own borders, for under our present complex commercial system, even the simplest transaction carried on entirely within the borders of a state is apt to have some indirect or remote effect upon interstate commerce. The Supreme Court of the United States, speaking through Mr. Chief Justice Hughes, in the case of *National Labor Relations Board vs. Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 L. Ed. 893, says:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes by the commerce among the several states and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

In the case of *Ratterman vs. Western Union Telegraph Company,* 127 U. S. 411, the Court quoted with approval its earlier language in the case of *Telephone Company vs. Texas,* 105 U. S. 460, as follows:

> "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations, or

states or the Indian tribes, that is to say, the purely internal commerce of the state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian tribes, belongs to Congress."

By granting judgment on the pleadings the Defendant was prohibited from introducing evidence to show that the Act and regulations promulgated thereunder, insofar as they related to the locality in which Defendant operated his plane, were arbitrary and unreasonable and that such regulation had no reasonable relationship to the regulation or safety of aircraft being operated in interstate commerce.

It is admitted in this case that Petitioner operated his craft entirely within the borders of the State of Utah. Had he been given an opportunity he would have shown by evidence that he constructed an airworthy craft upon which he sought a license from the Civil Aeronautics Authority of the United States Government, but that the said authority refused even to examine his craft for the purpose of determining its airworthiness. He would further have shown that he purchased a tract of land near his home at Murray, Utah, for the purpose of using the same as a private airport for the operation of his home-built craft. He would have shown that the Civil Airway designated by the Civil Aeronautics Authority through the State of Utah cut a swath 20 miles wide across the state and covered a territory which contains more than half the population of that State, including the area in which he lived and in which his private airfield was located. He would further have shown that the average number of aircraft coming through this Civil Airway in one day of 24 hours was 44. In other words, less than one every 30

minutes. He would further have shown that the control of this huge portion of the air space above Utah was utterly unnecessary to the protection and regulation of these infrequent flights of craft engaged in interstate commerce. He would have shown that the possibility of craft operating in this zone interferring with craft in interstate flight was so remote as to be almost negligible. He would have shown that under the regulation he could not even take off from his own private airfield, circle same entirely within its boundaries, and land again without having violated the act in question.

The opinion of the Circuit Court of Appeals indicates your Petitioner contended that on the trial of the case he could have shown that the flight of his aircraft in the designated civil airway did not in any way endanger or interfere with safety in interstate commerce. Such is not the contention. The contention is that he could have shown, not merely that such flight did not actually endanger or interfere with the safety of interstate commerce, but that the conditions of air commerce in that territory were such that, as indicated above, the chances of his interferring with craft in interstate flight were so remote as to be negligible.

He would further have shown that even though his aircraft was in all respects airworthy, because of the fact that it was a home built craft he could not even take off from his own field and operate his plane over such field; whereas, commercially-built craft much inferior in design are permitted to fly wherever they wish in this airway, merely because the Civil Aeronautics Authority will grant certificates of airworthiness to commercially-built craft, but will

not license home-built craft regardless of their degree of excellence.

If the government can, under the commerce clause, regulate intrastate commerce under conditions such as would have been shown to exist had the Petitioner, the Defendant below, been permitted to produce his evidence as above indicated, then the commerce clause of the federal Constitution must be expanded by interpretation to give the Congress full and complete control over all commerce, both interstate and intrastate. Such is not the holding of the Courts. See *Lewisville N. O. & T. R. Company vs. Mississippi,* 133 U. S. 587; *Mondou vs. New York, N. H. & H. R. Company,* 223 U. S. 1; *Howard vs. Illinois Central Railroad Company,* 207 U. S. 463; *United States vs. DeWitt,* 9 Wall 41; *Milnor vs. New Jersey Railroad and Transportation Company,* 3 Wall 782.

In the case of *Santa Cruz Fruit Packing Company vs. National Labor Relations Board,* 303 U. S. 453, 82 L. Ed. 955, this court, speaking by Mr. Chief Justice Hughes, stated:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *A. L. A. Schechter Poul-*

*try Corp. vs. United States,* 295 U. S. 495, 546, 79 L. Ed. 1570, 1588, 55 S. Ct. 837, 97 A. L. R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' Id., p. 554.

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

To find "immediacy or directness" would in this case, as in the case of *A. L. A. Schechter Poultry Corporation vs .United States,* supra, be to find it almost everywhere, a result clearly inconsistent with the maintenance of our federal system.

If, under the commerce clause, Congress can permit one of its agencies to choose any territory which it desires and designate the air above such territory as a "civil airway" in which only planes operating under regulations and conditions imposed by the federal government may fly, then, under the guise of such a power, practically all of the activities of the State and its citizens may be regulated. The federal government or its agency could have made the "civil airway" 50 miles wide or 100 miles wide or could have made it wide enough to cover all the air over the State of Utah. Under the theory of the decision of the Circuit Court, the statute and regulations might be changed

so as to limit the height of buildings in a designated airway so that the Federal Government might conceivably go to the extent of saying to the State of Utah: You shall not allow any building or structure in the State of Utah to be higher than 20 stories, or 10 stories, or even 2 stories. If, under the theory of the Circuit Court, the federal government should determine that all air over the State of Utah should be designated as a civil airway and regulation over activities therein taken over by the federal government or its agency, then conceivably it might say to our farmers: You cannot operate or maintain upon your farms derricks which are over 10 feet high.

The above are admittedly extreme and far-fetched cases, but are not beyond the realm of possibility if the federal government's powers to designate civil airways and regulate the activity therein are not in some way limited Where is this line to be drawn? The statute under which judgment was rendered against your Petitioner glibly defines "air commerce" as the "operation or navigation of aircraft within the limits of any civil airway" and permits the government agency to designate any paths which it desires as "civil airways." The statute, under the theory of the Circuit Court's opinion, might be amended to include in the definition of "air commerce," "all activity and operations within the limits of a civil airway."

In the State of Utah, many inventors and amateur aircraft builders are and have been at work on their own properties considerable distances from the routes regularly traveled by planes in interstate commerce, trying to develop, through their inventive genius, advancements in aircraft construction. Having perfected some invention they desire to test it by taking their craft off the ground.

They do not have the means to have their craft tested by commercial builders upon expensive commercial testing fields and testing grounds. They desire to take their planes off the ground and put them into the air to see whether or not their mechanical devices resulting from their inventive labors are practicable. The State of Utah, in order to encourage the development of aviation, is willing to inspect these craft to determine whether they are airworthy, and if so to issue certificates showing such airworthiness.

Can we stretch the powers granted to the federal government by the commerce clause of the federal Constitution to the point where the federal government can say to a citizen of the State of Utah: We recognize that you own property far removed from a regular interstate air route; that you have an airplane approved and licensed and designated as airworthy by the State of Utah; but we will not let you take that plane off the ground any distance at all into the air, because we have designated all of the air in the State of Utah as a civil airway.

If the commerce clause can be stretched to that extent, as it must be if the Act and regulations under which judgment was rendered against the Petitioner are to be upheld, then all rights of the states to regulate their internal affairs must be abandoned to the federal government and the Tenth Amendment may as well be cast aside as an out-worn, out-moded and meaningless part of our Constitution.

We respectfully submit that the broad definition of air commerce and the broad powers to define civil airways as set forth in the Civil Aeronautics Act of 1938, Public No. 706, Seventy-fifth Congress, are not within the scope

and limits of the commerce clause and are such as to render the said Act unconstitutional as being in contravention of the Tenth Amendment to the Constitution of the United States.

Respectfully submitted,

GROVER A. GILES
ZAR E. HAYES,
*Attorneys for Petitioner*

# INDEX



## CITATIONS





520469—43——1

Miscellaneous—Continued.

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 806

CORT A. ROSENHAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The judgment of the District Court of the United States for the District of Utah (R. 15) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 17–22) is reported in 131 F. (2d) 932.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 16, 1942 (R. 22). On February 8, 1943, the time within which to file a petition for writ of certiorari was extended to

March 15, 1943, by Mr. Justice Murphy (R. 24). The petition for writ of certiorari was filed March 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

## QUESTIONS PRESENTED

1. Whether Section 302 of the Civil Aeronautics Act of 1938, providing for the establishment of civil airways across states, and Section 610, forbidding the operation of aircraft within a civil airway without a certificate of airworthiness, are constitutional as applied to a flight entirely within a state.

2. Whether the certificate of airworthiness referred to in Section 610 (a) (1) of the Act includes one issued by a state regulatory body.

## STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, pp. 10–18, *infra*.

## STATEMENT

The United States, by civil complaint containing four causes of action, brought suit against petitioner in the United States District Court for the District of Utah, to recover civil penalties for violation of Section 610 (a) (1) of the Civil Aeronautics Act of 1938 (R. 4–7). After an amended answer was filed to the complaint (R. 8–11, 12–13), the United States moved for

(R. 12) and was granted judgment upon the pleadings (R. 14). The facts as shown by the pleadings are as follows:

Pursuant to Section 302 of the Civil Aeronautics Act, the Administrator of the Civil Aeronautics Authority designated and established a civil airway from San Francisco to New York, which included an airspace twenty miles wide through the State of Utah (R. 4–5, 8).[1] Thereafter, on four separate dates in 1940, petitioner operated in air commerce, within that civil airway in the State of Utah, a civil aircraft for which there was not currently in effect an airworthiness certificate issued by the Civil Aeronautics Authority (R. 5–7).

Admitting these facts, petitioner defended upon the grounds that at all times mentioned the aircraft was operated within the limits of the State of Utah (R. 10); that he had an airworthiness certificate for the aircraft from the Utah State Aeronautics Commission (R. 8–11); and that the Civil Aeronautics Act insofar as it purported to apply to the operation of aircraft entirely within the border of the state violated the Tenth Amendment to the Constitution (R. 10, 12–13).

The District Court entered judgment for the United States on the pleadings and assessed a

[1] Section 60.2001 of the Air Traffic Rules as amended to May 31, 1938. Subsequent amendments (14 C. F. R., 1940 Supp. § 600.2 (a) (2), p. 1327) are not here involved.

civil penalty of $1 against petitioner on each of the four counts (R. 14–15). The court below affirmed (R. 22), holding that the Civil Aeronautics Act was constitutional insofar as it marked out civil airways across the State of Utah and undertook to regulate flying therein, and that the airworthiness certificate issued by the Utah State Aeronautics Commission did not meet the requirements of Section 610 (a) (1) of the Act.

**ARGUMENT**

The Civil Aeronautics Act makes it unlawful "for any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (Sec. 610 (a) (1)). Air commerce is defined to include "any operation or navigation of aircraft within the limits of any civil airway" (Sec. 1 (3)), which is in turn defined as a path through the navigable air space designated or approvel by the Civil Aeronautics Administrator "as suitable for interstate, overseas, or foreign air commerce" (Sec. 1 (16)). Petitioner admittedly operated an aircraft within the civil airway which crossed the State of Utah without a certificate of airworthiness issued by the Civil Aeronautics Authority. He contends here, however, as he did below, that he is not liable for the civil penalties provided in Section 901 (49 U. S. C. 621) because the Act, if applied to his flight solely within Utah, is an unauthorized assumption of Federal jurisdiction in a field reserved exclusively to the states under the Tenth Amendment.

He further contends that even if the Act be constitutional, the certificate of airworthiness issued to him by the Utah State Aeronautics Commission constituted sufficient compliance with Section 610 (a) (1).[2] We submit that the court below correctly decided these questions adversely to petitioner's contention.

1. The power of the Federal Government over interstate means of transportation is plenary (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426) and clearly extends to facilities such as airways which are used or are susceptible of being used as highways of commerce. *The Daniel Ball*, 10 Wall. 557; *cf. Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279. The prohibition against flight of aircraft within the interstate highway unless the constituted federal authority has certified such aircraft as "airworthy" is a safety measure in the interests of the interstate traffic over that highway (*cf.* Secs. 601, 603 (c) of the Act), and in view of the undeniably close relationship of any flight within an interstate air highway to the commerce sought to be protected by the federal law (*cf. Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *Wright-*

[2] Petitioner alleges in his petition that he had constructed his airplane himself (p. 1), that he had made application to the Civil Aeronautics Authority for a certificate of airworthiness, and that the Board had refused to examine his plane (pp. 2, 17–18). These facts were not alleged in his answer and are nowhere reflected in the record.

*wood Dairy Co.,* 315 U. S. 110, 119) safety measures may appropriately be applied to movements over the highway which are entirely within a state. *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 27; *Texas and Pacific Ry.* v. *Rigsby,* 241 U. S. 33, 41; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 607; *cf. Kirschbaum Co.* v. *Walling,* 316 U. S. 517.

Petitioner's contention that the interstate traffic over the airway was too trifling to support regulation of intrastate flights is without merit, for if the power exists its exercise is solely for the legislative judgment. *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 408. The reasonable relation of the regulation to the federal objective is obvious from the truism that unrestricted flights by unapproved aircraft through an interstate airway lane may endanger and seriously interfere with aircraft moving in interstate commerce. As the court below observed (R. 21), it is not material whether petitioner's flights in question actually endangered interstate commerce in the civil airway.

2. The certificate of airworthiness required by Section 610 (a) (1) of the Act is clearly one to be issued by the Civil Aeronautics Authority. The declaration of policy (Section 2 of the Act) emphasizes the desire to "assure the highest degree of safety" in air transportation through appropriate regulation by the Authority, and Sec-

tion 601 vests the Authority with general regulatory power "to promote safety of flight in air commerce". Section 603 empowers the Authority to issue an "airworthiness certificate" containing terms and conditions "required in the interest of safety" for any plane which the Authority finds, after inspection, conforms to the type certificate therefor and "is in condition for safe operation". Section 610 prohibits the operation of aircraft in air commerce without an airworthiness certificate, "or in violation of the terms" thereof.[3] It is impossible not to conclude from these provisions that the certificate required by Section 610 is one issued by the Authority. Any other conclusion invites danger to interstate air transportation from conflicting standards as to airworthiness of craft flying in the same lanes, and renders Section 610 virtually ineffective.[4] As the court below observed (R. 20), "the Act does not textually recognize a state certificate of airworthiness as a compliance with its requirements, and we cannot presume a congressional intent to do so."[5]

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[3] Sections 601, 603, and 610 are part of a subchapter entitled "Civil Aeronautics Safety Regulations."

[4] This danger was adverted to at the hearings on the bill. See Hearings on H. R. 9738 before the House Interstate and Foreign Commerce Committee, 75th Cong., 3d Sess., pp. 343–344.

[5] Civil Aeronautics Bulletin No. 4 (Oct. 1, 1939), as brought up to Jan. 1, 1943, by the Civil Aeronautics Authority, shows

The historical setting of the Act likewise compels the conclusion reached below. Under Section 3 of the Air Commerce Act of 1926, c. 344, 44 Stat. 568, 569, the Secretary of Commerce was authorized to provide by regulation for the rating of aircraft of the United States for airworthiness. The regulations which he issued pursuant thereto (quoted in part *infra*, pp. 16–18) defined "an airworthiness certificate" as a "document issued by the Secretary to the registered owner of an aircraft, certifying that the aircraft in question is airworthy when operated and maintained in accordance with the terms of said certificate" (14 C. F. R. 01.13). After enactment of the Civil Aeronautics Act on June 23, 1938, vesting such powers in the Authority, these regulations were amended on August 30, 1938, by substituting "Authority" for "Secretary" and "Civil Aeronautics Act of 1938" for "Air Commerce Act" (14 C. F. R., p. 633 (1938 Supp.)). The certificate of airworthiness to which Section 610 of the Act re-

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that thirty-nine states require a Federal airworthiness certificate. Eight states, of which Utah is one, require a Federal or State airworthiness certificate. The Utah statutes call for substantial similarity to the Federal regulations governing safety and recognize the danger of accident through conflicting rules and regulations. However, the term "airworthiness" as defined by the Utah Code Ann. (1943), § 4–0–19 (8) permits deviation from Federal standards in the discretion of the State authority. Only one state requires its own airworthiness certificate regardless of the Federal requirement.

fers—an established term at the time the 1938 Act was passed—could only have meant a certificate issued by the Federal authorities, and it has consistently been so construed since that time by the officers charged with enforcement of the Act (see First Annual Report of Civil Aeronautics Authority (Nov. 15, 1939), p. 33; see also regulations cited pp. 17, 18, *infra*). Petitioner's airworthiness certificate issued by the Utah State Aeronautics Commission was therefore properly held ineffective to excuse violation of Section 610 (a) (1).[6]

CONCLUSION

The decision below is correct. There exists no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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APRIL 1943.

[6] This case does not raise any question, and none was raised below, as to the validity of the certificate issued by the State Commission. In this aspect of the case, there is involved only the question of whether such a certificate can dispense with the necessity for an airworthiness certificate issued under Federal authority.

## APPENDIX

The Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973 (49 U. S. C. §§ 401, *et seq.*) provides in part as follows:

> SECTION 1. As used in this Act, unless the context otherwise requires—
>
> * * * * *
>
> (3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> * * * * *
>
> (16) "Civil airway" means a path through the navigable air space of the United States, identified by an area on the surface of the earth, designated or approved by the Administrator as suitable for interstate, overseas, or foreign air commerce.
>
> * * * * *
>
> SEC. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

SEC. 302. (a) The Administrator is empowered to designate and establish civil airways and, within the limits of available appropriations made by the Congress, (1) to acquire, establish, operate, and maintain along such airways all necessary air navigation facilities; (2) to chart such airways and arrange for the publication of maps of such airways, utilizing the facilities and assistance of existing agencies of the Government so far as practicable; (3) to acquire, establish, operate, and maintain, in whole or in part, air navigation facilities at and upon any municipally owned or other landing area approved for such

installation, operation, or maintenance by the Administrator; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic moving in air commerce: *Provided,* That the Administrator shall not acquire any airport by purchase or condemnation. The Administrator is empowered to approve the establishment of such civil airways, not designated or established by the Administrator, as may be required in the interest of the public. No exclusive rights shall be granted for the use of any civil airway, landing area, or other air navigation facility.

* * * * *

SEC. 601. (a) The Authority is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Authority, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons

whose examinations or reports the Authority may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers;

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Authority may find necessary to provide adequately for safety in air commerce; and

(7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this title, the Authority shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and it shall make classifications of such standards, rules, and regulations, and certificates appropriate to the differences between air transportation and other air

commerce. The Authority may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Authority shall exercise and perform its powers and duties under this Act in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem itself required to give preference to either air transportation or other air commerce in the administration and enforcement of this title.

* * * * *

SEC. 603. (a) (1) The Authority is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2) Any interested person may file with the Authority an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Authority shall make an investigation thereof and may hold hearings thereon. The Authority shall make, or require the applicant to make, such tests during manufacture and upon completion as the Authority deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenance of such aircraft, aircraft en-

gine, propeller, or appliance. If the Authority finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Authority, it shall issue a type certificate therefor. The Authority may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Authority may record upon any certificate issued for aircraft, aircraft engines, or propellers, a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

(b) Upon application, and if it satisfactorily appears to the Authority that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Authority shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft engines, propellers, or appliances. The Authority shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate as may be necessary to assure manufacture of each unit in conformity with the type certificate or any amendment or modification thereof. The Authority may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety.

(c) The registered owner of any aircraft may file with the Authority an application for an airworthiness certificate for such aircraft. If the Authority finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, it shall issue an airworthiness certificate. The Authority may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Authority and shall set forth such information as the Authority may deem advisable. The certificate number, or such other individual designation as may be required by the Authority, shall be displayed upon each aircraft in accordance with regulations prescribed by the Authority.

* * * * *

SEC. 610. (a) It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

* * * * *

(b) Foreign aircraft and airmen serving in connection therewith may, except with respect to the observance by such airmen of the air traffic rules, be exempted from the provisions of subsection (a) of this section, to the extent, and upon such terms and conditions, as may be prescribed by the Authority as being in the interest of the public.

* * * * *

REGULATIONS

Civil Aviation Regulations, 14 C. F. R., provide in part as follows:

SECTION 01.0. *Provision for issuance.*—Pursuant to the provisions of the Air Commerce Act requiring the Secretary of Commerce to provide for the rating of aircraft as to their airworthiness, the Secretary will issue aircraft certificates in accordance with the provisions in this part.

* * * * *

01.10. *Certificated aircraft.*—The term "certificated aircraft" means any aircraft for which an aircraft certificate other than a registration certificate has been issued.

01.11. *Airworthy.*—As used herein the term "airworthy" when applied to a particular aircraft or component thereof denotes the ability of such aircraft or component thereof to perform its function satisfactorily throughout a range of operations determined by the Secretary in rating the aircraft or component thereof.

* * * * *

01.13. *Airworthiness certificate.*—An airworthiness certificate is hereby defined as a document issued by the Secretary to the registered owner of an aircraft, certifying that the aircraft in question is airworthy when operated and maintained in accordance with the terms of said certificate.

* * * * *

01.21. *Application for airworthiness certificate.*—Application for an airworthiness certificate shall be made to the Secretary on a form supplied for the purpose.

* * * * *

01.231. *Inspection of aircraft.*—Each individual aircraft for which an airworthiness certificate is desired shall be presented for inspection to a designated representative of the Secretary for the purpose of determining the airworthiness of the aircraft.

* * * * *

01.420. *Airworthiness of type.*—As one requisite to the issuance of a type certificate, the airworthiness of the type of aircraft or component shall be established to the satisfaction of the Secretary. This will require the construction of at least one complete aircraft or component of the type for which the type certificate is desired. In the case of aircraft it is further required that an airworthiness certificate (See § 01.2) be obtained for an aircraft of the type in question. For certain classes of aircraft and components the requirements for airworthiness, including special requirements for type certification, are specified hereinafter as follows:

| | |
|---|---|
| Airplanes | Part 04 |
| Gliders | Part 05 |
| Rotorplanes | Part 06 |
| Aerostats | Part 07 |
| Aircraft Engines | Part 13 |
| Aircraft Propellers | Part 14 |
| Aircraft Equipment | Part 15 |

* * * * *

60.31. *Aircraft certificate.*—No flight of civil aircraft, other than of a foreign aircraft, shall be made or authorized to be made—

(a) Within the limits of a civil airway or control zone of intersection whatever the purpose or nature of the flight may be, unless such aircraft is possessed of valid aircraft registration and airworthiness or experimental certificates, or

(b) Elsewhere in the navigable airspace over the lands and waters of the United States if engaged in interstate or foreign air commerce, unless such aircraft is possessed of such valid aircraft certificates, or

(c) In violation of any term, specification or limitation of such certificates.

Civil Aviation Regulations, 14 C. F. R., 1938 Supp.:

Part 01. Note 2, page 633: Regulation 601–A–1, Aug. 20, 1938; 3 F. R. 2052 amends Part 01 by substituting:

(1) "Authority" for "Secretary" or "Bureau".

(2) "Civil Aeronautics Acts of 1938" for "Air Commerce Act".

(3) "air carrier" for "airline carrier".

(4) "inspector of the Authority" for "Bureau inspector".

(5) "Civil Aeronautics Authority" for "Department of Commerce".

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